83-851

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

Petitioner,

—v.—

CRAIG MCCARTHY,

Respondent,

—and—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can the Bark PEKING which is on exhibit afloat alongside Petitioner's pier, which has not sailed under its own power in 50 years, which cannot be steered, which is not required to be inspected by the United States Coast Guard, and which is not intended to be returned to navigation, be deemed a "vessel" so as to subject Petitioner to a suit for damages under § 905(b) of the Longshoremen's and Harbor Worker's Compensation Act in addition to its workmen's compensation obligation?

2. By giving the broadest possible meaning to the term "vessel" for purposes of permitting a liability action against Petitioner-employer under § 905(b) of the Act, did the Court of Appeals misinterpret the scope of this Court's remand of this case as well as other decisions of this Court which stress the objective of the 1972 Amendments to the LHWCA of reducing litigation in favor of compensation payments?

3. Was the decision of the Court of Appeals in error, disruptive of the uniformity concept of the maritime law, and in conflict with decisions of this Court, other Courts of Appeals, as well as its own prior decision, in rejecting the traditional "in navigation", "in commerce", and Jones Act tests of a "vessel" for purposes of § 905(b) of the LHWCA in favor of a vague and litigation inspiring "residual capacity", "hypothetically plausible possibility" or "non-nautical" test of a vessel?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 716 F.2d 130 (2d Cir. 1983). The decision of this Court remanding the case to the Court of Appeals is reported at ____ U.S. ____, 103 S.Ct. 809, 74 L.Ed. 2d 1010 (1983). The first opinion of the Court of Appeals is reported at 676 F.2d 42 (1982). The opinion of the District Court is not officially reported, but is reported at 1981 A.M.C. 2995 (S.D.N.Y. 1981). All opinions are reprinted in the Appendix to this Petition.

JURISDICTION

The opinion and decision of the Court of Appeals for the Second Circuit sought to be reviewed was entered on August 23, 1983. No Petition for rehearing was filed in the Court of Appeals. This Petition for Writ of Certiorari is filed within 90 days of August 23, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED[1]

Title 33 U.S.C. § 902(3) provides:

> The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Title 33 U.S.C. § 902(21) provides:

> *The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer or bare boat charterer, master, officer, or crew member.*

Title 33 U.S.C. § 903(a) provides:

Coverage

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occuring upon the navigable waters of the United States (*including any*

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1 Emphasis shows 1972 amendments.

adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . ."

Title 33 U.S.C. § 905(b) provides:

(b) *In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.*

Title 1 U.S.C. § 3 provides:

The word vessel includes every description of watercraft or other artificial contrivance, used, or capable of being used, as a means of transportation on water.

Title 46 U.S.C. § 713 provides:

> Definitions, schedule, and tables
>
> In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"; and the term "vessel" shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term "owner" shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong.

STATEMENT OF THE CASE

Jurisdiction arises in the District Court under 28 U.S.C. § 1333 where a maritime tort is alleged to have occurred over navigable matters.

The opinion of the District Court, described in the first Court of Appeals opinion as "well reasoned," 676 F.2d at 45, App. p. 19a, and in the second Court of Appeals opinion,[2] 716 F.2d at 132, App. p. 3a, as "excellent," described the Bark PEKING as follows:

> The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of

2 Both by the same panel and author.

> being towed, its rudder has been welded in one position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.

The Court adopted Judge Knapp's description which it said was supported by the record and which appears in both opinions. *See* App. p. 18a and pp. 3a-4a.

It might be added that on the motion for summary judgment in the District Court, the uncontested affidavit of the Museum's historian stated among other criteria recited by the District Court and the Court of Appeals on two occasions, that when towed from England to New York, in July of 1975, PEKING was "treated as a floating hulk by both English and United States customs officials". (App. p. 30a).

As appears in the two opinions, respondent, a "self-styled, historical iron-worker and shiprigger" employed by the Museum, was injured while painting the main mast and spars of the PEKING.[3]

As summarized in the second opinion, 716 F.2d at 132, App. p. 4a, the Court had on the first occasion affirmed the District Court's grant of summary judgment in favor of the Museum on grounds that respondent was not engaged in maritime employment at the time of his injury, that he was not therefore an "employee" within the meaning of 33 U.S.C. § 902(3), and since "not an 'employee' for purposes of the LHWCA, he could not recover damages under its provisions." The Court went on to state that in *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. ____, 103 S.Ct. 634, 74

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3 (App. pp. 3a and 18a). At the time according to the first opinion, 676 F.2d 42, 44, App. p. 17a, it was "berthed at the Museum". In the second opinion the same Court states without support from the record that PEKING "rides at anchor in the harbor." 716 F.2d at 136, App. p. 13a.

L.Ed. 2d 465 (1983)[4] this Court had held that workers required to perform their employment duties upon navigable waters were engaged in "maritime employment" under the above section of the LHWCA, irrespective of whether their activities were traditionally maritime or not. As a result of the *Perini* decision, this Court on January 24, 1983 remanded the within action to the Court of Appeals for reconsideration in light of that case. On the same day this Court denied petitions for certiorari in seven other cases extending over a two year period.[5]

In its first opinion the Court of Appeals isolated two issues: 1) Whether or not respondent was an employee in maritime employment at the time of his injury and 2) Whether or not he was injured as a result of the "negligence of a vessel" within the meaning of 33 U.S.C. § 905(b). *See* 676 F.2d at 45, App. p. 19a. While the "vessel" issue was said to be left open, the Court nevertheless came to grips with it by holding that Respondent had "not satisfied the status test" of maritime employment because he was not working aboard a "vessel" at the time of his injury. In evaluating the status of PEKING, the Court noted, 676 F.2d at 45, App. p. 21a, that its rudder has been welded in one position, that it had not sailed since the 1930's and that there was no intention by Petitioner to return her to active navigation. The Court concluded by stating:

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4 Hereinafter "*Perini*."

5 The seven cases embrace, among others, such diverse employments as a night watchman who boarded a vessel in port for repairs in the performance of his duties, *Robert W. Kirk & Associates v. Holcomb*, 655 F.2d 589 (5th Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S. Ct. 814, 74 L.Ed 2d 1013 (1983); a construction worker engaged in building a draw bridge over navigable waters, *B.F. Diamond Constr. Co. v. LeMelle*, 674 F.2d 296 (4th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 830, 74 L.Ed 2d 1024 (1983); a sales manager for custom built recreational and racing boats who only devoted some of his time to maritime duties, *Sanger Boats Inc. v. Schwabenland*, 683 F.2d 309 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct., 814 74 L.Ed. 2d 1013 (1983), and an airplane pilot spotting fish in waters off the Gulf Coast, *Zapata-Haynie Corp. v. Ward* 684 F.2d 1114 (5th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 815, 74 L.Ed 1013 (1983).

> The LHWCA was intended to apply only to workers employed in activities related to *vessels which at least have the potential to engage in navigation or in commerce on navigable waters. The PEKING no longer has that potential.* (emphasis added)

Without anything intervening except this Court's decision in *Perini, supra*, which undeniably mandates that Respondent is entitled to workmen's compensation benefits under the LHWCA rather than under the New York Workmen's Compensation Act, the Court of Appeals, continuing to adopt the same findings of Judge Knapp which noted that PEKING has not sailed under its own power for half a century, now maintains (716 F.2d at 135, App. p. 12a):

> A craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel'. The question is one of residual capacity.

The Court further notes that as long as PEKING "rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel." The difference in the two opinions between no longer having the "potential" to be in navigation or commerce and a "residual capacity" to engage in navigation or commerce could hardly be more striking, and the change finds no justification in this Court's remand.

Despite the inconsistency between the two opinions, Petitioner did not move for reargument in the Court of Appeals on these varying interpretations of what is a "vessel." Petitioner deemed it unlikely that the same Court, having changed its mind once, would return to its original reasoning without further instructions from this Court. If Petitioner's position as set forth herein be correct, and if review is not granted at this time, it will have to await a trial on the merits, an appeal on the merits to the Court of Appeals and an additional Petition for Writ of Certiorari to this Court before that position may be vindicated.

Meanwhile, as the law of the Second Circuit, the decision can have an impact not only on Petitioner's "vessels" but,

within this Circuit, on such similar museum exhibits as, for example, at Mystic Seaport in Connecticut and the former aircraft carrier INTREPID, berthed in the Hudson River in Manhattan, in addition to other maritime museums without the Circuit. Moreover, not only in the Second Circuit but elsewhere at shipyards throughout the country, it will encourage litigation at any stage of the building of a "vessel" and even render such structures as floating restaurants liable to suits for damages by their employees, in addition to claims for compensation under the LHWCA.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals misinterpreted the scope of this Court's remand of this case, as well as other decisions of this Court which stress the objective of the 1972 Amendments to the LHWCA of reducing litigation in favor of compensation payments, when it gave the broadest possible meaning to the term "vessel" for purposes of permitting a liability action against petitioner-employer under § 905(b) of the Act.

Throughout its second opinion the Court tends to find itself bound, even with seeming reluctance, to employ the most expansive definition of a "vessel" that can be mustered, casting aside even the liberally construed Jones Act, 46 U.S.C. § 541-713, interpretation, 716 F.2d at 134 n.2, App. p. 8a n.2, in favor of one that is "broadly inclusive," "perhaps even the hypothetically plausible". Thus it found that there had emerged a "non-nautical concept of a vessel" that need not be actually engaged in navigation or commerce but only have a "residual capacity" to do so. The Court concluded that much as it would like to formulate a definition which would capture the seagoing essence of a vessel, it felt constrained, because PEKING "still rests upon navigable waters and may be returned to the sea, if only in tow", to give the most "expansive scope" to that term.

While clearly Respondent is now entitled to workmen's compensation benefits under the LHWCA, it is submitted that

the Court of Appeals has gone too far and applied the philosophy of broadest possible *compensation* coverage to the construction of a *liability* claim without any instruction or even indication from this Court that it should do so.

The LHWCA is recognized as preeminently a Compensation Act, not a Liability Act such as the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, or the Jones Act, 46 U.S.C. § 688 *et seq.*, and when it is construed liberally to achieve its purposes, those ends are intended which promote the prompt, adequate and uncomplicated payment of compensation to the injured worker. *Rodriguez v.Compass Shipping Co.*, 451 U.S. 596, 612 (1981).

The statistics cited by Justice Stevens in his dissenting opinion in *Perini, supra,* 74 L.Ed. 2d at 489-90, which note that some 270,000 longshoremen and ship repairmen are covered by the Act, that in addition there are 300,000 employees of private employers within the District of Columbia and another 200,000 in defense bases and outer continental shelf projects, further illustrate the point. Thus, it is not unreasonable to conclude that while all are entitled to workmen's compensation benefits, a majority will have no occasion to sue a "vessel" or take advantage of the one exception to the exclusiveness of remedy provision found in § 905(a) to sue their employers under the *Reed v. The YAKA*, 373 U.S. 410 (1963) concept, as more recently discussed by this Court in *Jones & Laughlin Steel Corporation v. Pfeifer,* ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983).

While giving an expansive construction to compensation coverage in accordance with the purposes of the Act, this Court has moved in the opposite direction when litigation rather than compensation is at issue. Thus there is no justification in the *Perini* case for the Court of Appeals to have afforded a broad "compensation interpretation" to what is a "vessel" under § 905(b) of the Act.

Bearing in mind that *Perini* instructs us that the Act is to be interpreted in terms of "statutory construction and legislative intent", this Court has already derived interpretations from the

overall Congressional intent to curtail litigation, those that were not actually spelled out in the statute. The Court of Appeals, finding no "precise guidelines" in § 902(21) and with the legislative history "not helpful", applied the broadest possible definition to a "vessel". Similarly, this Court in *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156, 165 (1981) observed that § 905(b) did not specify what acts or omissions of the vessel would constitute "negligence" and said that the legislative history did not furnish "sure guidance for construing § 905(b)." By way of contrast with the Court of Appeals, however, this Court was able to formulate a negligence standard of care, consistent with the Congressional purpose of reducing litigation, one for example, that did away with any obligation of the shipowner to inspect or supervise the stevedoring operation.

While the Court of Appeals nods in the direction of this Court's decision in *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980), it fails to acknowledge the underlying philosophy of that decision and its reliance on the Congressional intent of reducing litigation to insure that employers would have sufficient funds to pay the additional compensation rate. Such an appreciation should be all the more noteworthy in a situation where the employer is also said to be the "vessel owner" and would have an exposure both for compensation and liability, where in the more typical three-party situation, the employer would no longer be liable for indemnification, having only a compensation obligation, while the non-employing vessel owner would have a liability exposure but none for compensation. In accordance with the principle of having employer resources available for compensation payments, this Court ruled in *Bloomer* that the employer was entitled to full reimbursement for its compensation payments from its employee's recovery of damages against a vessel owner, unreduced by any cost of that litigation. Here again, this Court gave voice to the underlying purposes of the Act although the result reached did not appear in so many words in any statutory language. Indeed, the very language of the House

Report[6] quoted on page 83 of the *Bloomer* decision, even militates against the preservation of the *Reed v. The YAKA* concept. Quoting from the Senate Report, this Court noted "the social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." This Court therefore concluded in *Bloomer, supra*, 445 U.S. at 85-86, that "It would be ironic indeed" if the amendments designed to eliminate the employer's third-party liability were so interpreted as to give birth to a new liability, namely a charge against the compensation payments made for the employee's legal expenses in an action against the vessel owner.

Might not this Court therefore paraphrase its own language (p. 86) in *Bloomer*, to find application here:

> We are unwilling to attribute to Congress an intention to allow creation of [an expansive definition of a "vessel"] irreconcilable with its general desire to reduce litigation and to ensure conservation of the legal expenses of stevedores and their insurers.

Nor is the *Bloomer* decision an isolated one. On the same topic of reducing litigation in favor of payment of compensation benefits, this Court had said earlier in *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256, 261 n.9 (1979), that while generally compensation does not compensate for an employee's entire loss "the 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable."

In citing *Bloomer*, this Court observed in *Rodriguez v. Compass Shipping Co., Ltd., supra*, 451 U.S. at 616:

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6 As the House Report notes, the consequence was that a "stevedore-employer is indirectly liable for damage to an injured longshoreman who utilizes the technique of suing the vessel, with the result that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H.R.Rep. No. 92-1441, p. 5 (1972); see S.Rep. No. 92-1125, p. 9 (1972).

> Moreover those changes remind us that one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen.

Noting that the level of benefits was substantially increased, this Court again noted (p. 616) the likelihood "that the statutory compensation recoverable without proof of fault would be adequate." It went on to comment that the amendments were intended to increase "the relative importance of statutory awards as the favored method of compensation."

Most recently this Court stated in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Program*, ____ U.S. ____, 103 S.Ct. 2045, 76 L.Ed. 2d 194, 203 (1983):

> . . . the Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and the harborworkers on the one hand and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty and delay that tort actions entail.

It is submitted therefore that the Court of Appeals takes an altogether incorrect approach, one out of step with all of the decisions of the Court on the subject, when it maintains, 716 F.2d at 136, App. p. 13a, that § 905(b) and the legislative history "evince no intention to limit the scope of the employee's negligence remedy against the vessel by placing a restrictive construction on the term 'vessel' ". This is not the point. Given the stated purposes of the Act, as set forth repeatedly by this Court, it is rather whether the Court was correct in utilizing the most expansive interpretation of the word "vessel".

It is therefore submitted that the Court of Appeals misinterpreted the scope of the remand of this case by this Court, that it construed the *Bloomer* case and the other cited decisions of

this Court having to do with the conservation of employer resources and the curtailment of litigation faultily and that this Court in the exercise of its powers of supervision over the Courts of Appeals should grant the Petition and resolve this issue which now has become the law of the Second Circuit.

2. Whether the test of a "vessel" is measured by the language of 1 U.S.C. § 3 or that generally applicable to seamen, 46 U.S.C. § 713, it would seem that the rejection of the "in navigation" or "in commerce test" and the adoption of a "non-nautical" or "residual capacity" test by the Court of Appeals is in conflict with the traditional view laid down by this Court in innumerable decisions and followed in overwhelming number by the Courts of Appeals. This is especially true in cases under the LHWCA where the definition of a "vessel" is construed similarly, if not required to be entirely in line with what is a "vessel" for Jones Act purposes, as will be demonstrated *infra* (2(b)).

Curiously the Court of Appeals, not without reason, cites no decisions of this Court in support of its "residual capacity", "non-nautical" or "hypothetically plausible" thesis of what is a "vessel".

a. Historically and even apart from the Jones Act and the LHWCA PEKING would not be considered a "vessel" under the decisions of this Court.

The Court of Appeals observed in the first opinion, 676 F.2d at 44, App. p. 18a, that PEKING has not put to sea under its own power since the 1930's and while it would prefer to "slip her moorings, ease into the harbor and head for the open seas with the seagulls in her wake", that "Sadly, she is fated not to do so." Indeed, it "no longer has that potential" to engage in navigation or in commerce on navigable waters. 676 F.2d at 46, App. p. 21a.

In the second opinion, it was again noted that PEKING "has not put to sea under her own power for half a century." 716 F.2d at 132, App. p. 4a. Moreover, the Court agreed, 716 F.2d at 135, App. p. 11a, that "No rational person would suggest

that the PEKING is in a position gracefully to 'slip her moorings, ease into the harbor and head for the open seas' . . . ."

While personifying PEKING in picturesque language in both opinions, the Court fails to take into consideration the difference between "her once-proud bearing" as a vessel, one that sailed the high seas under her own power, earning her way by carrying cargo and passengers and her present state, where if moved at all PEKING is reduced to being pulled in tow. It is perhaps at this point and while considering venerability that we should look to an eighty year old decision of this Court which, judging by the frequency with which it is cited has, despite its longevity, survived as an authority longer than PEKING has fulfilled its original role as a vessel.

In *The Robert W. Parsons*, 191 U.S. 17 (1903) the issue was whether there was state or admiralty jurisdiction to enforce a lien for repairs on a canal boat, which at the time was engaged in navigating the Erie Canal in New York. The boat was propelled by horse power in the primitive sense of the term. In holding admiralty jurisdiction controlled, this Court said (p. 30):

> In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards *only the purpose for which the craft was constructed and the business in which it is engaged.* (emphasis added)

Ruled out as vessels were such items (p. 30) as "the floating drydock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors Bethel moored to a wharf, . . . and a gas float moored as a beacon . . . ." Rejecting the argument that maritime jurisdiction did not obtain because it was drawn by horses along the Erie Canal, this Court said (p. 31):

> So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage or with new discoveries made in the art of navigation.

More important for us today than the means of propulsion are the two criteria listed by the Court and their application to PEKING. Certainly the Court of Appeals would agree that "the purpose for which PEKING was constructed" is not being fulfilled if it requires being towed to be moved, and the "business in which it is engaged" as a museum exhibit is certainly not navigation or commerce. It may also be seen that this Court employed the present tense and not any "residual capacity" nor "hypothetically plausible" capacity for transportation. In short, the test should be what is PEKING now, not what PEKING was fifty years ago.

In this connection, the Court may also take notice that it has never been the contention of Petitioner that the variety of floating craft cited by the Court of Appeals are not vessels or that self-propulsion is a requisite to being a vessel. Thus, limited use vessels such as floating cranes,[7] derricks and ordinary barges,[8] houseboats[9] and pleasure boats,[10] all meet the *The Robert W. Parsons* criteria and are irrelevant to an evaluation of PEKING. Thus, if a houseboat without propulsion is towed from one point to another as the owners seek a change in place of floating habitation, it is fulfilling its original purpose and it is precisely how it was intended to be moved.

The Robert W. Parsons drew upon the earlier decision of *Cope v. Vallette Dry Dock Company*, 119 U.S. 625 (1887),

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7 *Bongiovanni v. N.V. Stoomvaart-Maats "Oostzee"*, 458 F. Supp. 602 (S.D.N.Y. 1978); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975).

8 *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980) [derrick barge]; and *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982); *Norton v. Warner Co.*, 321 U.S. 565 (1944) [barges].

9 *Hudson Harbor 79 Street Boat Basin Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979); *Miami River Boat Yard Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968).

10 *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44 (5th Cir. 1980).

which held that there was no maritime jurisdiction over a salvage claim for drydock since "not used for the purpose of navigation, . . ." stating as well:

> The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage.

This Court cited as an example:

> A sailor's floating bethel or meeting house, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category.

Similarly, in 1920 this Court in *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 245, 246, ruled that a claim for supplies furnished and repairs made to a schooner which had been launched but not yet completed was not within admiralty and maritime jurisdiction despite the fact that the hull was capable of being towed and was indeed towed from Groton to New London, Connecticut. This Court denied maritime jurisdiction commenting that while the schooner had been launched and was water-borne it was "not sufficiently advanced to discharge the functions for which intended, ..." Commenting that contracts for the construction of a vessel are not deemed to be within admiralty jurisdiction, this Court said this was so because "It is said that in no proper sense can they be regarded as *directly* and *immediately* connected with navigation or commerce by water." (emphasis supplied).

In 1926 this Court in *Evansville v. Bowling Green Packet Co.*, 271 U.S. 19, held that a wharf boat which sank in the Ohio River was not permitted limitation of liability. Reviewing the predecessor statute of 1 U.S.C. § 3, it held that a wharf boat employed to transfer freight between steamboats and land and from one steamboat to another, and although capable of being towed, was still not a vessel for purposes of seeking limitation of liability. This Court noted (p. 21) that it was "not subject to government inspection as are vessels operated on navigable waters." (p. 22) "It was not practically capable of

being used as means of transportation." "It did not encounter perils of navigation to which craft used for transportation are exposed."

In *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944), cited by the Court of Appeals for the adoption of the 1 U.S.C. § 3 definition of a "vessel", this Court insisted on a contemporary capability for navigation and transportation, not a "residual capacity", stating (p. 57):

> A barge is a vessel within the meaning of the Act even when it has no motive power of it own, since it *is* a means of transportation on water. (emphasis supplied).

More recently this Court held in *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982), that two pleasure boats in collision were within admiralty jurisdiction although there was no commercial aspect to their navigation, citing 1 U.S.C. § 3. This Court reasoned (p. 674):

> The federal interest in protecting maritime commerce cannot be adequately served if federal jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. The interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct.
>
> * * * *

(p. 675):

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern *that admiralty law holds for navigation*, compels the conclusion that this collision between two pleasure boats on navigable waters *has a significant relationship with maritime commerce.* (emphasis added)

b. The rejection by the Court of Appeals of the Jones Act test of a vessel for purposes of § 905(b) of the LHWCA is in conflict with the decisions of this Court and the Courts of Appeals.

In citing a potpourri of authorities under a variety of statutes, it is clear that the Court of Appeals did not hew to the admonition contained in footnote 29 of this Court's opinion in *Perini, supra*, 74 L.Ed. 2d at 482 n.29, where among other things this Court cautioned:

> Although the term 'maritime' occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the Act these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades'. *Boudreaux v. American Workover Inc.*, 680 F.2d 1035, 1050 (CA5 1982).

The Court of Appeals, in searching for a definition of the term "vessel" as found in § 905(b) of the LHWCA stated, 716 F.2d at 135, App. p. 8a, that Congress did not provide a definition "different from the generally acknowledged one" found in 1 U.S.C. § 3. Therefore, it presumed that Congress intended "to adopt this commonly-used term." In so doing it expressly discarded cases decided under the Jones Act, 46 U.S.C. §§ 541-713, which "have looked to a different test in determining what is a vessel for Jones Act purposes." 716 F.2d at 132 n.2, App. p. 8a n.2. As will be developed, this is essentially the "in navigation"[11] criterion.

In rejecting the Jones Act analysis, the Court below has overlooked that part of the original definition of employee appearing in §§ 2(3) and 3(a)(1) of the Act which excludes "a master or member of a crew of *any vessel*," (emphasis added) as well as the historic interplay between the Jones Act and the LHWCA found in so many of the decisions of this Court. As to this, the Court of Appeals for the Fifth Circuit, as recently

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11 The statutory definition of a "vessel" most closely associated with the Jones Act is found in 46 U.S.C. § 713 (cited *supra*), which specifies a vessel to be "in navigation".

as August 15, 1983, in *Parks v. Dowell Division of Dow*, 712 F.2d 154, 158, has held that a Jones Act "seaman" and a "crew member" "excluded from the Longshoremen's Act are one and the same." Since the Jones Act definition of a "vessel" is pertinent in determining who are "excluded" from LHWCA coverage, it would hardly make for an orderly interpretation of the same statute to have a different definition of a "vessel" to determine who are "included."

It is not altogether surprising that the Jones Act and the LHWCA definition of a vessel should be read harmoniously. As expressed by this Court speaking through Mr. Justice Cardozo in *Warner v. Goltra*, 293 U.S. 154, 156 (1934), it was thought at one time and despite their lack of resemblance to seamen, that longshoremen were indeed entitled to sue under the Jones Act. This was prior to the enactment of the LHWCA. This Court provided guidance for the future when it then said (p. 159):

> The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act in pari materia, the Longshoremen's and Harbor Workers' Compensation Act (U.S.C. title 33 §§ 901 *et seq.*) adopted in [March 4] 1927. This Act expressly excludes from its 'coverage' a 'master or member of a crew of any vessel'. §903.

The exclusion was inserted because seamen preferred to remain outside of the compensation provisions. *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251, 257 (1940). Thus, a distinction was made between those who perform a certain service aboard the vessel as distinguished from those who were "naturally and primarily onboard to aid in her navigation." *Id.*, at 260.

So closely linked are the LHWCA and Jones Act that the Court of Appeals in employing the 1 U.S.C. § 3 definition of a vessel, set forth in *Norton v. Warner, supra*, 321 U.S. at 571 n.4, nevertheless overlooked the holding in the case which ruled that a bargeman working on a vessel in navigation and which served as a "means of transportation on water" was

actually covered under the Jones Act and not entitled to claim under the LHWCA, as the Court below suggested. The same intertwined relationship between the Jones Act and the LHWCA is evident in this Court's decision in *Swanson v. Marra Brothers Inc.*, 328 U.S. 1, 7 (1946).

It is also difficult to follow how the Court of Appeals could reject the Jones Act criteria of a "vessel" when for so many years (1946-1972) both seamen and longshoremen mutually enjoyed the same warranty of seaworthiness as to a vessel under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99 (1946).

The criteria for a "vessel" has continued to remain the same for both seamen and longshoremen. In *Desper v. Starred Rock Ferry Co.*, 342 U.S. 187, 191 (1951), again contrary to the "residual capacity" rationale espoused by the Court below, this Court ruled, as to seamen:

> The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter'.

There being no vessel, decedent became only (p. 191) a "probable navigator" and this Court held that the Jones Act "does not cover probable or expectant seamen but seamen in being."

On the longshoremen or harbor-worker side of the coin, this Court ruled in *West v. United States*, 361 U.S. 118 (1959), that no warranty of seaworthiness existed in favor of a repairman employed by an independent contractor and engaged in reactivating a previously laid-up vessel. Although in the mothball fleet at Norfolk, Virginia, it was towed to Philadelphia with a skeleton officer crew aboard, and where work commenced. The repair specifications indicated (p. 121) that the vessel was not seaworthy for a voyage, and that major repairs "would be necessary before one could be undertaken." The warranty of seaworthiness was deemed inapplicable because as this Court said (p. 122), "The MARY AUSTIN, as anyone could see was not in maritime service."

Two years later this Court decided *Roper v. United States*, 368 U.S. 20, 21, (1961), an action by a longshoreman. The District Court had dismissed the suit because "since the ship in fact was not in navigation there was no warranty of seaworthiness." As with PEKING, her rudder was secured, along with other equipment and the ship "lost her Coast Guard safety certificate as well as her license to operate, both of which were requisites to a vessel in navigation." Again as would be with PEKING, this Court noted (p. 21), "Indeed the trial court found that 'admittedly' reactivation of the ship would have required a major overhaul." The vessel was thereafter used for grain storage, but "not reactivated for navigation nor use for transportation purposes, ..." After being towed to loading facilities and filled with grain, it remained for two years until towed back to the grain elevator for unloading. No activation repairs were made, nor was any effort made to obtain a license to operate as a vessel in navigation, and none was issued. The fact that the SS HARRY LANE was twice towed had no impact on this Court's decision. It was simply not a vessel in navigation. The Court said (p. 24), "This movement was by tug without assistance from the ship's motive or directional equipment which, indeed, was not in the least useable." The Court then concluded that since the "SS HARRY LANE was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness." Significantly, this Court then went on to comment (p. 24):

> This limitation is analogous to that applied in libels under the Jones Act, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation.

When Congress amended the LHWCA in 1972, it did not, as the Court of Appeals agrees, furnish a new definition of a "vessel" and certainly not one different than in § 2(3) or § 3(a)(1) which were partially amended to broaden compensation coverage for "maritime employment" but did not alter the exclusion for crew members on "any vessel".

The seamen exclusion was indeed described by this Court in *Perini, supra*, 74 L.Ed. 2d at 474, as the first of five conditions a worker had to overcome to obtain coverage under the original LHWCA.[12]

Just as this Court has ruled in *Perini* that the 1972 Amendments by their silence did not alter the maritime status of workers injured over navigable waters, so too, the historical definition and interpretation of the word "vessel" appearing in §§ 2(3) and 3(a)(1) should also remain unchanged by a Congressional stillness on the subject, especially where other portions of the same sections *were* amended. If the word "vessel" has already been defined and interpreted in §§ 2(3) and 3(a)(1), should it be done any differently in §§ 2(21) and 5(b) which were added in 1972 without qualification?

Various Courts of Appeals have also considered the interaction between the Jones Act, and the LHWCA. In *Hawn v. American Steamship Co.*, 107 F.2d 999 (2d Cir. 1939), a vessel was withdrawn from navigation for storage of soybeans and was without her classification. Plaintiff was therefore deemed not "a member of a crew of the ship at the time of his injury." He was limited to compensation under the LHWCA. In *Nelson v. Greene Line Steamers Inc.*, 255 F.2d 31 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958), a Mississippi River excursion vessel was tied up for the winter, therefore not in navigation, and one working aboard on repairs was held not a seaman. In *Hill v. B.F. Diamond*, 311 F.2d 789 (4th Cir. 1962), the Court stated as a general proposition (p. 792):

> Even ships, beyond question vessels in navigation when in service, are not vessels in navigation when undergoing major construction work to fit them for navigation, or after decommissioning when they are being prepared for storage.

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12 "First, the worker had to satisfy the 'negative' definition of 'employee' contained in § 2(3) of the 1927 Act in that he could not be a 'master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.' "

Similarly, for purposes of *Reed v. The YAKA*, *supra*, the Court of Appeals for the Fifth Circuit in *Chahoc v. Hunt Shipyard*, 431 F.2d 576 (5th Cir. 1970), cited by the Court below, while acknowledging that a floating drydock might under some circumstances be a vessel when actually under tow, ruled as a matter of law that it was not "while moored to the bank and operated as drydock." Nor would a substantially incomplete "vessel" qualify, as found in *Garcia v. American Marine Corporation*, 432 F.2d 6 (5th Cir. 1971).[13] *See also Keller v. Dravo Corporation*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972), which held that a floating drydock is not a vessel at least "when it is moored and in use as a drydock" and that the barge inside the drydock was not a vessel because undergoing substantial repairs and out of navigation.

In *Cook v. Belden Concrete Products Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973), recovery was sought alternatively under the Jones Act and under *Reed v. The YAKA*, *supra*. Involved was a floating construction platform (flat-deck barge) moored in navigable waters. Citing, among other authorities, *The Robert W. Parsons, supra*, the Court noted the "determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged." Pertinent to our case, is the language of the Fifth Circuit in footnote 5, p. 1001, which observes that while the construction platform was capable of being towed and while under tow in navigable waters might, as with a dry dock, "for a limited time become a subject of maritime jurisdiction . . ., "neither the *capability* for *such movement* nor the fact that the dock has been *moved through navigable waters in the past* establishes that the dock, while secured to the bank and in service is a vessel." (emphasis supplied). The Court again noted on p. 1002 that if actually engaged in navigation "at the time of appellant's injury", it

13 *Cf.*, *Lundy v. Litton Systems Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), involving a vessel, moored to a dock, in its final stages of outfitting preparatory to sea trials, 97% complete with a crew aboard, one of whom was charged with negligence.

might be classified as a vessel but not while "engaged in its primary function as a stationary construction platform."

The *Cook* case in the Fifth Circuit was then closely followed by *Powers v. Bethlehem Steel Corp.* in the First Circuit, 477 F.2d 643, *cert. denied*, 414 U.S. 856 (1973). There the Court held that for purposes of the Jones Act or the LHWCA, a work raft which had been previously moved or towed around Boston harbor was not a vessel (p. 647):

> The purpose and business of the present craft was not the transportation of passengers, cargo or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time.

The Court went on to say that it "may well be" (p. 648) that when "in actual navigation—such as when, unattached to land, it is under tow for an appreciable distance over navigable water—it will temporarily acquire a vessel's status."

By way of contrast, *Salgado v. M.G. Rudolph Corp.*, *supra*, 514 F.2d 750 (2d Cir. 1975) also concerned with the mutually exclusive question of whether the injured party was a seaman or a longshoreman, while rejecting seaman's status to a worker without a more or less permanent connection with the vessel, held that a floating crane performing its function (p. 756) of transporting goods over water was indeed a vessel. The injured employee (p. 757) "was doing work which was the primary purpose of the crane, i.e. loading ships."

As late as 1978 the Court of Appeals for the Fifth Circuit, in *Blanchard v. Engine and Gas Compressor Services, Inc.*, 575 F.2d 1140, again cited (p. 1142) the rule in *The Robert W. Parsons, supra*, and its own earlier decision in *Cook v. Belden Concrete Products, supra,* for the propositions that buildings erected on permanently sunken barges are not Jones Act vessels, since (p. 1143) "Gulf moreover did not intend to move these structures on a regular basis . . ." "they did not carry navigation lights or equipment, lifeboats or any lifesaving gear nor were they registered with the Coast Guard as vessels." The Court went on to say (p. 1143) "In fact, Gulf emphasizes that

they could be moved, if at all, only under the most favorable weather conditions." It concluded as it had in its prior opinion that "[m]ere flotation on water does not constitute a structure, a 'vessel' . . . ."

In *Watkins v. Pentzien Inc.*, 660 F.2d 604 (5th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982), two barges secured together, used as a construction platform and capable of being (p. 607) "towed from place to place by a tug", were held not vessels for Jones Act purposes with the Court also saying:

> Our decision that the two-barge structure in which Watkins was injured was not a vessel in navigation also disposes of his claim under the general maritime law.

Citing its decision in *Cook v. Belden Concrete Products, supra*, the same Court updated the rule of *The Robert W. Parsons, supra*, saying "The critical inquiry is 'the purpose for which the craft was constructed and the business in which it is engaged'."

In *Barger v. Petroleum Helicopters Inc.*, 692 F.2d 337 (1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2430, 77 L.Ed. 2d 1316 (1983), the Court of Appeals for the Fifth Circuit concluded that the estate of a deceased helicopter pilot could not claim a Jones Act remedy since a helicopter was not a vessel. It also said in footnote 5, p. 341, again imposing the same test for a vessel under the Jones Act as under § 905(b) of the LHWCA, "However § 905(b) is simply irrelevant here unless a helicopter is a 'vessel'. We have concluded that it is not." Even the dissent qualified the helicopter as a "vessel" only because (p. 343):

> It is maritime because of the nature of the work it regularly performed—the transportation of persons and property.

In *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349 (1983), the Fifth Circuit repeated (p. 1354) the oft cited criteria that the so-called "vessel must be 'designed for navigation and commerce,' " and, "At the very least such a vessel must be in

use for navigation or direct commerce *at the time of the accident*." (emphasis supplied).

A District Court decision applying the definition of a "vessel" correlatively under the Jones Act and the LHWCA is *Jefferson v. SS BONNY TIDE*, 281 F. Supp. 884, 885 (E.D. La. 1968). It was held that a "vessel" launched and riding on navigable waters was still "unprepared for and incapable of navigation *at the time of plaintiff's injury*." (emphasis supplied). The Court said that since the BONNY TIDE was not a vessel, there was no cause of action under the Jones Act or for unseaworthiness, and moreover:

> Consequently, *Reed v. The YAKA*, 373 U.S. 410 . . . , does not apply to permit the plaintiff longshoreman to circumvent the exclusiveness of his compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

A "uniform test", according to *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980), has been employed "applicable to both the Jones Act and the LHWCA, to determine an individual's status as a harbor worker or a crewman/seaman." Should not a uniform test also be applied as to what is a "vessel" under each? *Mayfield v. Wall Shipyard Inc.*, 510 F. Supp. 605, 607 (E.D. La. 1981) answers the question in the affirmative.

Fleming v. Port Allen Marine Service Inc., 552 F. Supp. 27 (M.D. La. 1982), citing such authority as *The Robert W. Parsons, supra*, and *Cook v. Belden Concrete Products Inc., supra,* ruled that a work platform was not a vessel under § 905(b) of the LHWCA. The Court reached its decision against an indistinguishable backdrop of both Jones Act and § 905(b) cases. It repeated that "mere flotation on water" was not enough (p. 30) nor was the fact that it was moved around the yard by a tug boat. *Id.*, at 28. The Court concluded since not "primarily designed to serve in navigation," it was not a vessel.

It is perhaps curious that the analysis of the Court of Appeals places little, if any, emphasis on the decisions of this

Court in general or those of other Courts under § 905(b) and it expressly puts aside the companion Jones Act evaluation of a "vessel". With the exception of *Luna v. STAR OF INDIA*, 356 F. Supp. 59 (S.D. Cal. 1973), it seems to rely on maritime lien cases for its "hypothetically plausible", "residual capacity" and "non-nautical" concepts. At the same time, it entirely overlooks the teaching of the enduring *The Robert W. Parsons* decision of this Court, *supra*, itself a lien case, and followed in so many other authorities construing a vessel alternatively under the Jones Act or the LHWCA even down to the decision in *Fleming v. Port Allen Marine Service Inc., supra*, of less than a year ago.

If the lien cases afford a broader definition of vessel, as suggested in *New England Fish Co. v. The Barge or Vessel SONYA*, 332 F. Supp. 463, 468 n.4 (D. Alaska 1971),[14] it may well be under the rationale that liens are most often incurred by vessels under 46 U.S.C. § 971 while they are not in active service or navigation. *See also In Re Queen Ltd.*, 361 F. Supp. 1009 (E.D. Pa. 1973). *Cf., Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955), (a stationary shrimp processing, freezing and storage plant—held a vessel for lien purposes under 46 U.S.C. § 671) with *Garcia v. Universal Seafoods Ltd.*, 459 F. Supp. 463 (W.D. Wash. 1978) (floating seafood processor held not a vessel under Jones Act).

Farrell Ocean Services Inc. v. United States, 681 F.2d 91 (1st Cir. 1982), involved the susceptibility to maritime liens under 46 U.S.C. § 671 of "four vessels" loaded and transported on a barge. While not functioning as such at the moment, the Court said (p. 93), "These four vessels certainly were fully capable of operating as vessels." This of course is much more than the "residual capacity" or "hypothetically plausible" test of the Court below.

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14 However, in a lien claim for crew wages, the same Court employed a test that it said had been frequently examined by Courts considering the Jones Act and its relationship to the LHWCA (p. 467). It cited 46 U.S.C. § 713, and in deciding that no "vessel" existed for purposes of establishing a lien for crew wages noted "The owners had no intention of ever using her again as a means of transportation over the water . . . ." (p. 468)

M/V MARIFAX v. McCrory, 391 F.2d 909 (5th Cir. 1968), was also a lien case, but here the vessel had actually been restored to service after 15 years layup and had made a voyage before being taken into a shipyard for repairs. The Court said it was "not navigably impotent at the time of the appellees repair work and certainly she was capable of being used in navigation." Other lien cases cited by the Court below are *The Showboat*, 47 F.2d 286 (D. Mass. 1930), and *Hudson Harbor 79th Street Boat Basin Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979).

Luna v. STAR OF INDIA, *supra*, 356 F. Supp. at 65, acknowledges that it was not applying the Jones Act test[15] of a "vessel" but "a broader definition" to determine whether or not admiralty jurisdiction existed as to a visitor aboard a museum "vessel". The Court was obviously concerned with the impact of this Court's then recent decision in *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and the whole status/situs concept of maritime jurisdiction. Clearly it was not deciding an action under the LHWCA.

We may be reminded once again of the cautionary language, cited earlier, of this Court in *Perini, supra*, 74 L.Ed. 2d at 482 n.29, with respect to employing the same word, in several different statutes, "Although the term 'maritime' occurs in 25 U.S.C. § 1333(1) and in § 2(3) of the Act these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.' "

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15 With more justification than the Court below which followed the *Luna* decision without commenting on the difference.

CONCLUSION

For the reasons set forth herein, Petitioner believes that a resolution of the definition of a "vessel" under the Longshoremen's and Harbor Workers' Compensation Act is required and therefore prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on August 23, 1983.

Respectfully submitted,

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APPENDIX

Court of Appeals Decision Reversing District Court Following Remand From This Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1411—August Term, 1982

Docket No. 81-7587

(Submitted April 21, 1983 Decided August 23, 1983)

CRAIG MCCARTHY,

Plaintiff-Appellant,

—v.—

THE BARK PEKING, her sails, equipment, appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Third Party Plaintiff-Appellee,

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE,

Third Party Defendants-Appellees.

Before:

TIMBERS, KEARSE and CARDAMONE,

Circuit Judges.

On remand from the Supreme Court for further consideration of our prior decision, 676 F.2d 42 (2 Cir. 1982), in light of that Court's subsequent decision.

Affirmed in part; vacated and remanded in part.

RICHARD L. DAHLEN, Edwin F. Lambert, Jr., and Dahlen & Gatewood, Boston, Mass., together with Zock, Petrie, Reid & Curtin, New York, N.Y., submitted a brief *for plaintiff-appellant McCarthy.*

FRANCIS X. BYRN, William J. Troy III, and Haight, Gardner, Poor & Havens, New York, N.Y., submitted a brief *for third party plaintiff-appellee South Street Seaport Museum.*

ALAN G. CHOATE, Joseph F. Moore, Jr., Wayne W. Suojanen, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., together with Mark O. Kasanin, Richard C. Brautigam, and McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., submitted a brief amici curiae *for National Maritime Historical Society and National Maritime Museum Association.*

TIMBERS, *Circuit Judge:*

Following our prior decision in this case on April 12, 1982, 676 F.2d 42 (2 Cir. 1982), appellant petitioned for

certiorari with respect to a part of our decision. On January 24, 1983, the Supreme Court entered the following order (51 U.S.L.W. 3552):

> "82-53 McCarthy v. Bark Peking. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. __ (1983)."

On March 3, 1983, upon receipt of a certified copy of the judgment of the Supreme Court, an order was entered by our Court vacating our judgment of April 12, 1982. On March 31, 1983, we entered a further order inviting counsel to file supplemental briefs addressed to the issue with respect to which the case had been remanded to us for further consideration. Such briefs have been filed. The case is now ripe for decision by us on the remand from the Supreme Court.

For the reasons stated below, we affirm our prior decision in part, and vacate and remand in part.

I.

We assume familiarity with the facts of this case as summarized in our prior opinion, 676 F.2d at 44-45, as well as in the excellent opinion of the district court of June 3, 1981.

In short, McCarthy was injured on December 12, 1979 while painting the upper mainmast and spars of the Bark Peking, a museum vessel on exhibit as one of the artifacts at the South Street Seaport Museum. Her rudder is

welded in one position and she has not put to sea under her own power for half a century. McCarthy commenced an action in the Southern District of New York on June 9, 1980, seeking, in Count I, damages against the vessel itself and against its owner, the Museum, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981) (LHWCA or Act). In Count II, he sought damages against the Museum because of an allegedly wrongful discharge pursuant to § 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1) (1976) (OSHA).

In affirming the district court's order granting summary judgment in favor of defendants, we held, with respect to Count I, that McCarthy was not engaged in "maritime employment" at the time of his injury; that he therefore was not an "employee" within the meaning of § 2(3) of the Act, 33 U.S.C. § 902(3) (1976); and that, since he was not an "employee" for purposes of the LHWCA, he could not recover damages under its provisions. 676 F.2d at 45-46.

With respect to Count II, we affirmed the district court's order granting summary judgment in favor of the Museum on the ground that McCarthy had failed to file a timely complaint with the Secretary of Labor, as required by § 11(c)(2) of OSHA, and therefore had not exhausted his administrative remedies. 676 F.2d at 46-47. Judge Kearse, concurring in the judgment that McCarthy could not recover under Count II, placed her concurrence on the ground that there is no implied right of action under § 11(c), as the Sixth Circuit had held in *Taylor v. Brighton Corp.*, 616 F.2d 156 (6 Cir. 1980).

II.

As for Count II outlined above, McCarthy did not include our decision with respect thereto in his petition for certiorari. Our holding on that count, set forth in Part IV of our opinion of April 12, 1982, stands undisturbed. We therefore confirm that part of our prior opinion and the judgment entered thereon.

III.

We turn next to Count I, as to which the Supreme Court remanded the case to us for reconsideration.

(A)

In *Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Associates*, 459 U.S. __ (1983), 51 U.S.L.W. 4074 (U.S. Jan. 11, 1983) (No. 81-897), the Court held that a construction worker injured on a cargo barge—where he was working to build a foundation for a sewage treatment plant—was engaged in "maritime employment". With respect to the status requirement of § 902(3), the Court held that "[w]e consider those employees to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." 51 U.S.L.W. at 4081.

Having reconsidered our prior decision in the light of *Director*, as the Court has ordered us to do, we now hold that McCarthy was a covered employee for purposes of the LHWCA, and that the Bark Peking is a "vessel" to the extent that McCarthy properly may allege the "negli-

gence of a vessel" and thus bring his action for damages under 33 U.S.C. § 905(b) (1976).

We conclude that McCarthy now must be considered to have been engaged in "maritime employment" at the time he was injured on the Bark Peking on December 12, 1979. He was "injured on the actual navigable waters in the course of his employment on those waters. . . ." *Director*, 51 U.S.L.W. at 4081. Under this latest Supreme Court decision, no more is required to qualify McCarthy as a statutory "employee".

(B)

That, however, does not end our inquiry under Count I. Since we hold that McCarthy was a statutory employee and thus was covered under the Act, we must now consider a second issue which we did not have the occasion to reach in our prior decision, namely, whether McCarthy was injured as the result of "the negligence of a vessel" within the meaning of § 905(b), so that his statutory remedies are not limited by § 905(a), the exclusivity provision of the Act.[1]

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[1] Under the Act, an injured employee is entitled to prescribed compensation from his employer. §§ 907-909. He may not bring an action against his employer for damages beyond the compensation remedy. § 905(a). An injured employee, however, may bring an action for damages against the vessel and her owner if his injury was caused by "the negligence of a vessel". § 905(b). If the owner also is the employer, the action for damages will still lie notwithstanding the purported exclusivity of the compensation remedy. *Reed v. S.S. Yaka*, 373 U.S. 410 (1963).

This current state of the law is the result of the 1972 amendments to the LHWCA, Pub. L. 92-576, *codified at* 33 U.S.C. §§ 901-950 (1976), they having replaced the employee's action for unseaworthiness—which in effect was a nautical rule of strict liability, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946)—with an action against the vessel for negligence. At the same time, Congress eliminated the owner's indemnity action against the longshore employer. § 905(b). The net result of the amendments was to limit the remedies of a statutory

The Museum and intervenors National Maritime Historical Society and National Maritime Museum Association now ground their argument entirely on the claim that the Bark Peking, museum piece that she is, does not qualify as a "vessel" for purposes of § 905(b), and therefore McCarthy could not have been injured as the result of "the negligence of a vessel". We hold that this is an unsupported narrowing of the term "vessel" as it is used in the Act.

The 1972 amendments to the Act, note 1 *supra*, which provided that a statutory employee may bring an action for damages against a vessel for injuries caused by "the negligence of a vessel", § 905(b), added to the statute in § 902(21) only a circular definition of the term "vessel":

> "The term vessel means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member."

Obviously this definition does not provide precise guidance as to what is included within the term "vessel". The legislative history similarly is not helpful. Those courts which have considered the term subsequent to the 1972 amendments, however, have held it to be broadly inclusive.

For example, in *Burks v. American River Transportation Co.*, 679 F.2d 69 (5 Cir. 1982), the court held that non-propelled river barges, in use as transports, were

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employee to two: compensation from the employer regardless of fault, and an action for damages against the vessel where the employee's injury was caused by "the negligence of a vessel".

"vessels" within the meaning of § 905(b). Such varying seafaring entities as a 97% completed destroyer, *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5 Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), a yard derrick barge, *Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4 Cir. 1980), and a floating crane, *Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee"*, 458 F. Supp. 602 (S.D.N.Y. 1978), also have been held to be "vessels" within the meaning of § 905(b).

We do not believe that our canvass should be confined to those cases decided subsequent to the 1972 amendments. Courts which have construed the term "vessel", under the LHWCA as well as in analogous contexts, almost uniformly have adopted the definition set forth in the General Provisions of the United States Code, 1 U.S.C. § 3 (1976) ("section 3"), referred to below. *E.g.*, *Norton v. Warner Co.*, 321 U.S. 565, 571 n.4 (1943) (LHWCA); *Burks v. American River Transportation Co.*, *supra*, 679 F.2d at 75 (LHWCA); *Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee"*, *supra*, 458 F. Supp. at 609 (LHWCA). Since Congress, in its use of the term "vessel" in §§ 902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly-used term. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 952-53 (7 Cir.), *aff'd*, 442 U.S. 940 (1979).[2]

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[2] In contrast, cases decided under the Jones Act, 46 U.S.C. §§ 541-713 (1976), have looked to a different test in determining what is a vessel for Jones Act purposes. *E.g.*, *Blanchard v. Engine & Gas Compressor Services*, 575 F.2d 1140, 1142 (5 Cir. 1978); *Hicks v. Ocean Drilling and Exploration Co.*, 512 F.2d 817, 823 (5 Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

Section 3 defines "vessel" to include "every description of watercraft or other artificial contrivance *used, or capable of being used, as a means of transportation on water.*" 1 U.S.C. § 3 (1976) (emphasis added). Pursuant to the axiom that "vessels" must be at least capable of use as a means of transportation on water, courts uncertain of a particular craft's place in nautical taxonomy have drawn distinctions based on the presence or absence of this residual capacity. *Compare, e.g., Keller v. Dravo*, 441 F.2d 1239, 1243-44 (5 Cir.), *cert. denied*, 404 U.S. 1017 (1971) (floating drydock attached to dock and used as construction platform held not be be a vessel under LHWCA as a matter of law); *Chahoc v. Hunt Shipyard*, 431 F.2d 576, 577 (5 Cir. 1970) (same), *with Burks v. American River Transportation Co., supra*, 679 F.2d at 71, 75 (non-propelled river barge held to be a vessel).

At the same time, however, virtually any capacity for use as seagoing transportation—perhaps even the hypothetically plausible possibility—has sufficed to lend the dignity of "vessel" status to a host of seemingly unlikely craft. *E.g., Hudson Harbor 79th Street Boat Basin, Inc.* v. *Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) (houseboat capable of being towed from one location to another viewed as analogous to a "dumb barge" and held therefore to be a section 3 vessel for purposes of admiralty and maritime jurisdiction); *Miami River Boat Yard, Inc.* v. *60' Houseboat*, 390 F.2d 596, 597 (5 Cir. 1968) (powerless houseboat held to be a "vessel"); *M/V Marifax* v. *McCrory*, 391 F.2d 909, 910 (5 Cir. 1968) (decommissioned Navy ship, 15 years in mothballs, held to be a "vessel" while in preparation for return to service as civilian ship); *Luna* v. *Star of India*, 356 F. Supp. 59, 63-66 (S.D. Cal. 1973) (historic ship in use as part of a maritime museum held to be a "vessel" because she was

"capable of engaging in maritime transportation, if only as a towed craft"); *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930) (retired schooner converted into a restaurant and dance hall remained a "vessel" under section 3).

In a variety of contexts, adding for illustrative purposes some of the cases we have already discussed, courts have found the following to be "vessels": *Salgado* v. *M. J. Rudolph Corp.*, 514 F.2d 750, 755-56 (2 Cir. 1975) (floating crane); *Bongiovanni* v. *N.V. Stoomvaart-Matts "Oostzee"*, *supra*, 458 F. Supp. at 610 (same); *In Re Queen Ltd.*, 361 F. Supp. 1009, 1010-11 (E.D. Pa. 1973) (propellerless boat awaiting transfer to a permanent berth); *Lundy v. Litton Systems, Inc.*, *supra*, 624 F.2d at 592 (uncompleted destroyer);[3] *Jones v. One Fifty Foot Gulfstar*, 625 F.2d 44, 47 n.2 (5 Cir. 1980) (ocean-tested yacht still in construction on dry land). Even more surprising, a Navy vessel converted into a stationary shrimp-processing plant was held to be a section 3 vessel in *Pleason v. Gulfport Shipbuilding Corporation*, 221 F.2d 621, 623 (5 Cir. 1955).[4] As Judge John Brown of the Fifth

3 *But see Garcia v. American Marine Corp.*, 432 F.2d 6, 7 (5 Cir. 1970) (substantially uncompleted ship held not to be a vessel); *Jefferson v. SS Bonny Tide*, 281 F. Supp. 884 (E.D. La. 1968) (same).

4 The court in *Pleason*, 221 F.2d at 673, gave a graphic description of the condition of the vessel:

> "A prior owner . . . had decided to scrap her, and had sold a substantial amount of her tackle and apparel. At the time she was brought in for the above-mentioned repairs, she was in substantially the following condition: her propellers and propeller shafts had been removed; she had no crew; none of her machinery was in operation; she had no light, heat, or power in operation; her main engines had been completely removed; all of her steering apparatus, with the exception of the rudder, had been removed and sold; her superstructure and masts were intact; her navigation lights were in place, though not operable; her compartmentation, including cargo holds, was intact. . . .
>
> After the services . . . were performed, she was towed across the Gulf of Mexico from Port Arthur to Port Isabel without crew or

Circuit stated the section 3 "vessel" anachronism: "[n]o doubt the three men in a tub would also fit within our definition [of "vessel" under § 3], and one could probably make a convincing case for Jonah inside the whale." *Burks v. American River Transportation Co.*, *supra*, 679 F.2d at 75.[5]

In light of the non-nautical concept of a vessel which has emerged in the case law, we are constrained to hold that the Peking remains a vessel despite her age and current use. No rational person would suggest that the Peking is in a position gracefully to "slip her moorings, ease into the harbor and head for the open seas. . . ." *McCarthy v. The Bark Peking*, *supra*, 676 F.2d at 44. On the other hand, the district court found that the Peking was capable of being towed, welded rudder notwithstanding.[6] Less than ten years ago, following her purchase by

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motive power or operative steering device of any kind. 'At Port Isabel she was moored to a dock by steel cables and ropes and engaged in receiving shrimp from trawlers for processing, freezing, storing and resale in commerce, in the same manner as a similar plant would operate on land. Shrimp were delivered on board in baskets just as they are unloaded on a dock or wharf. Telephone and electric lines from land were connected . . . although she had her own power system. The location of the vessel was changed once when she was towed down the ship channel and again secured, in the same manner, in a stationary position.' "

5 Indeed, a recent generation of law clerks, in their nefarious account of a voyage on a 22 foot sloop off the rock-bound coast of Maine, undoubtedly would be surprised to learn that they had been on a section 3 vessel and that they were covered by the LHWCA. Wald and Ford, *"The Death Voyage Of The Ensign"* (1980) (unpublished).

6 The district court described the Peking as follows—a description which we adopted in our prior opinion (676 F.2d at 44):

"The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is

her present owner, the Peking underwent a stormy voyage—albeit in tow—across the Atlantic to her berth at the South Street Seaport Museum. The Museum concededly is engaged in the restoration of the ship to at least a semblance of her once-proud bearing—if only, as it states, for illustrative purposes.

This brings the Peking into the category of many other vessels with similarly limited capacities. A craft need not be actually engaged in navigation or commerce in order to come within the definition of "vessel". The question is one of residual capacity. *Farrell Ocean Services, Inc. v. United States*, 631 F.2d 91, 93 (1 Cir. 1982); *M/V Marifax v. McCrory*, *supra*, 391 F.2d at 910. In *Marifax* the vessel had been in mothballs for 15 years. In *Luna v. Star of India*, *supra*, 356 F. Supp. at 63-66, the vessel was an historic three masted bark on display, like the Peking, as a museum ship. The court, interpreting section 3, held that as a museum ship she remained a vessel despite her long absence from the sea and her artifact status. *See also The Showboat*, *supra*, 47 F.2d at 286-87.

The houseboat in *Hudson Harbor 79th Street Boat Basin v. Sea Casa*, *supra*, 469 F. Supp. at 989, was no more likely to slip her moorings and head for the open seas than is the Peking. But the court in that case found, for the purpose of establishing its admiralty and maritime jurisdiction, that "it is clear that a floating houseboat capable of being towed from one location to another is a vessel within the admiralty and maritime jurisdiction of this Court."

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occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not put out to sea since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent."

The Museum and the intervenors, asserting that the Peking cannot be considered a vessel, rest their argument on the legislative history of § 905(b) which was added by the 1972 amendments. They claim that this section was intended to limit actions for damages. To the extent that this argument relies on the provision of § 905(b) which eliminates both the employee's action for unseaworthiness and the shipowner's action for indemnity from a negligent employer, the argument is correct. Section 905(b) was intended to "reduce litigation, immunize stevedores and their insurers from liability in third party actions, and assure conservation of stevedore resources for compensation awards to longshoremen." *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 84 (1981). But this section of the statute and the accompanying legislative history evince no intention to limit the scope of the employee's negligence remedy against the vessel by placing a restrictive construction on the term "vessel". *See generally* H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698.

The Peking may be fated to ride at anchor for the rest of her days. Her rudder is welded in place. Her owner has no intention of slipping her moorings and taking her again to the open seas, with the seagulls in her wake. But she retains at least this much of the dignity of her former venerable station: as long as she rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel. Much as we should like to formulate a definition of "vessel" that captures the essence of the seagoing definiendum, no Platonic form suggests itself; hence we are left with the halting efforts of the common law. The Peking, despite her moorings and her role as a museum piece, still rests upon navigable

waters and may be returned to the sea, if only in tow. Paraphrasing the late Mr. Justice Frankfurter in a different context, we "cannot keep the word of promise to [her] ear . . . and break it to [her] hope."[7]

In light of the expansive scope that has been given to the section 3 definition of "vessel", we hold that the Peking is a vessel for purposes of the LHWCA, and that McCarthy may bring his action under § 905(b) to recover damages for the "negligence of a vessel".

Affirmed in part, and vacated and remanded in part for further proceedings in the district court consistent with this opinion. No costs in this Court on the instant remand.

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[7] *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

Court of Appeals Decision
Affirming District Court

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued Dec. 14, 1981 Decided April 12, 1982

No. 445, Docket 81-7587

CRAIG MCCARTHY,

Plaintiff-Appellant,

—v.—

THE BARK PEKING, her sails, equipment, appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Third Party Plaintiff-Appellee,

THE STATE INSURANCE FUND and
NORTHBROOK EXCESS AND SURPLUS INSURANCE,

Third Party Defendants-Appellees.

On appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to Fed.R.Civ.P. 54(b), in the Southern District of New York, Whitman Knapp, District Judge, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum, the Court of Appeals, Timbers, Circuit Judge, held: (1) that plaintiff was not engaged in "maritime employment" within meaning of the Longshore-

men's and Harbor Workers' Compensation Act since vessel no longer had potential to engage in navigation or commerce on navigable waters, and (2) that since plaintiff had not exhausted administrative remedies available to him, there was no need to reach question whether he had private right of action under the Occupational Safety and Health Act.

Affirmed.

KEARSE, *Circuit Judge*, filed a concurring opinion.

RICHARD L. DAHLEN, Boston, Mass. (Edwin F. Lambert, Jr., New York City, Dahlen & Gatewood, Boston, Mass., and Zock, Petrie, Reid & Curtin, New York City, on the brief), for plaintiff-appellant.

FRANCIS X. BYRN, New York City (William J. Troy III, and Haight, Gardner, Poor & Havens, New York City, on the brief), for third party plaintiff-appellee South Street Seaport Museum.

RAYMOND C. GREEN and SUSAN R. PETITO, New York City, filed a brief for third party defendant The State Insurance Fund.

ALAN G. CHOATE, Joseph F. Moore, Jr., Wayne W. Suojanen, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., and Mark O. Kasanin, Richard C. Brautigam, and McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., filed a brief amici curiae for National Maritime Historical Society and National Maritime Museum Assn.

Before:

TIMBERS, KEARSE and CARDAMONE,
Circuit Judges.

TIMBERS, *Circuit Judge*:

On this appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to Fed.R.Civ.P. 54(b),[1] in the Southern District of New York, Whitman Knapp, *District Judge*, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum, the questions presented are (1) whether the district court correctly ruled that plaintiff was not engaged in "maritime employment" so as to bring him within the definition of an employee in § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 902(3) (1976);[2] and (2) whether the district court correctly ruled that plaintiff had forfeited his right to claim a wrongful discharge pursuant to § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1)(1976).[3]

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1 The district court issued a Rule 54(b) certificate because no adjudication was made with respect to defendants The State Insurance Fund and Northbrook Excess and Surplus Insurance Company, both of whom disclaimed coverage under their respective policies.

2 33 U.S.C. § 902(3) (1976) provides:

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

3 29 U.S.C. § 660(c)(1) (1976) provides:

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

We agree with Judge Knapp's rulings with respect to both questions. We affirm.

I.

In his opinion dated June 3, 1981, Judge Knapp succinctly described the Bark Peking as follows:

> "The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent."

We adopt Judge Knapp's description of the vessel which is supported by the record. We note only that, like all venerable vessels which never die, the Peking would like nothing more than to slip her moorings, ease into the harbor and head for the open seas, with the seagulls in her wake.

Sadly, she is fated not to do so.

II.

On December 12, 1979, plaintiff Craig McCarthy, a self-styled "historical ironworker and shiprigger," while employed by the Museum, was painting the upper mainmast and spars of the Peking. He was suspended in a bosun's chair which he controlled by a gantline—a length of one-inch manilla line.

The gantline "parted", causing plaintiff to fall some 60 feet where he grabbed a stay and thence climbed down another 60 feet to the deck below. He returned to work on March 13, 1980.[4]

On March 14, 1980, the day following his return to work, plaintiff, after conferring with members of the staff of the Museum, met with John B. Hightower, the president of the Museum. Plaintiff told Hightower that the Peking was seriously unsafe in several respects. Hightower, believing that plaintiff's conduct amounted to insubordination, fired him.

On June 9, 1980, plaintiff commenced the instant action in the Southern District of New York. In Count I of his complaint, plaintiff alleged admiralty and maritime jurisdiction and asserted a claim under the LHWCA for negligence against the Museum and the Peking, claiming that their negligence caused his fall on December 12, 1979. In Count II of his complaint, plaintiff alleged that the Museum discharged him in violation of his rights under the OSHA and the regulations promulgated thereunder.

Upon the Museum's motion for summary judgment, Judge Knapp, in a well reasoned opinion granted the motion with respect to both counts of the complaint and dismissed the action. From the judgment entered on Judge Knapp's opinion, this appeal has been taken.

III.

Turning to appellant's claim under the LHWCA, he contends, first, that he was an "employee" within the meaning of § 2(3) of the LHWCA, 33 U.S.C. § 902(3) (1976). Second, he contends that he was injured as the result of the negligence of a vessel within the meaning of 33 U.S.C. § 905(b) (1976), so that his remedies are not limited by the exclusivity provision of the LHWCA, 33 U.S.C. § 905(a) (1976). Since we hold that the

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4 In order to obtain compensation for the injuries he sustained as the result of his fall on December 12, 1979, appellant applied for and received benefits under the New York Workers' Compensation Law.

record establishes that he was not engaged in maritime employment, we do not reach his second contention.

In *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), the Supreme Court explained that the status test for recovery under the LHWCA is not directed at geographical considerations but "refers to the nature of a worker's activities."[5] *Id.* at 78. The fact that appellant's accident took place on the Peking is not dispositive of the question of whether he was engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA.

Our Court, in decisions since *Pfeiffer*, has interpreted the status test to "preclud[e] any application of the LHWCA . . . to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." *Fusco v. Perini North River Associates*, 622 F.2d 1111, 1113 (2 Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). *Accord, Churchill v. Perini North River Associates*, 652 F.2d 255, 256 n.1 (2 Cir. 1981) (per curiam) (quoting *Fusco*), *cert. granted sub nom. Director, Office of Workers' Compensation Programs v. Perini*, ____ U.S. ____ (1982). Other courts of appeals have adopted or retained similar tests subsequent to *Pfeiffer*. *E.g., Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 644 F.2d 827, 830 (9 Cir. 1981); *Odom Construction Co. v. Department of Labor*, 622 F.2d 110, 113 (5 Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The latter two cases rely on *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9 Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), a pre-*Pfeiffer* case which stated a requirement that "maritime employment" must have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " *Id.* at 961, *quoting Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 272 (1972).

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5 The LHWCA also includes situs requirements which are geographical in nature. *Pfeiffer, supra*, at 73-74. There is no suggestion that the LHWCA's situs requirements are not satisfied in the instant case where the accident did take place on navigable waters.

We hold that appellant has not satisfied the status test. The Peking's rudder has been welded in one position. She has not put to sea under her own power since the 1930's. Her present owners state that they do not intend to return her to active navigation. The LHWCA was intended to apply only to workers employed in activities related to vessels which at least have the potential to engage in navigation or in commerce on navigable waters. The Peking no longer has that potential.

The cases cited by appellant do not support a contrary conclusion. For example, in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2 Cir.), *cert. denied*, ____ U.S. ____ (1981), we set aside orders of the Benefits Review Board which denied recovery on the ground that the petitioner pier guards were not engaged in "maritime employment" within the meaning of § 2(3). In that case the dispositive factor was that petitioners' "major function . . . was to protect against the loss of cargo which unquestionably serves a maritime purpose—the safe transit of goods shipped by sea." *Id.* at 675. Appellant's work in the instant case served no such purpose.

Likewise, appellant's reliance on *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5 Cir.), *modified*, 657 F.2d 665 (1981), is misplaced. There, the Fifth Circuit reviewed an order of the Benefits Review Board which affirmed an award to respondent who, at the time of his injury, was working on a pleasure boat in his employer's boatyard. Respondent's usual work was that of a land-based carpenter in the boatyard. The Fifth Circuit affirmed the award because "[i]t is difficult to conceive of an activity more fundamental to maritime employment than the building and repair of *navigable* vessels." *Id.* at 998 (emphasis added). Appellant's work in the instant case, unlike that in *Bosarge*, bore no relationship to navigation or commerce on navigable waters.

We hold that, since appellant was not engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA, the district court correctly granted the Museum's motion for summary judgment with respect to Count I.

IV.

This brings us to appellant's second count which alleged that his discharge was discriminatory in violation of § 11(c)(1) of the OSHA, 29 U.S.C. § 660(c)(1)(1976), because he had complained that the Peking was unsafe. The district court granted summary judgment as to this count on the ground that appellant had failed to file a timely complaint with the Secretary of Labor, as required by § 11(c)(2) of the OSHA, 29 U.S.C. § 660(c)(2) (1976).[6]

Appellant now urges us to hold that there is a private right of action under § 11(c)(1) of the OSHA. The Sixth Circuit declined to imply such a right of action in *Taylor v. Brighton Corp.*, 616 F.2d 256 (6 Cir. 1980). In the instant case, we hold that there is no need for us to reach this question, since appellant did not exhaust the administrative remedies which were available to him.

Whether § 11(c)(2) precludes a private right of action under § 11(c)(1), as the Sixth Circuit held in *Taylor*, appellant first must utilize the remedies provided by Congress. *See, e.g., McKart v. United States*, 395 U.S. 185 (1969). Appellant failed to file a timely complaint with the Secretary. The word "may" in § 11(c)(2) does not mean that the remedy provided for in that section is merely one of several alternatives. While we do not reach the question whether there is an implied private right

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6 29 U.S.C. § 660(c)(2) (1976) provides:

> "(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

of action under § 11(c)(1), we do hold that, even if one existed, it could be invoked only after the filing of a timely complaint with the Secretary had proved fruitless.

We hold that, since appellant failed to exhaust his administrative remedies, the district court correctly granted the Museum's motion for summary judgment with respect to Count II.

Affirmed.

KEARSE, Circuit Judge, concurring:

I concur in the judgment of the Court and in Parts I-III of the majority opinion. With respect to Part IV of that opinion, I agree that plaintiff may not recover, but I do so because I conclude that, for the reasons set forth in *Taylor v. Brighton Corp.*, 616 F.2d 156 (6th Cir. 1980); *see also Pavolini v. Bard-Air Corp.*, 645 F.2d 144, 146 n.3 (2d Cir. 1981), there is no implied right of action under 29 U.S.C. § 660(c).

District Court Memorandum and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3258 (WK)

CRAIG MCCARTHY,

Plaintiff,

—against—

THE BARK PEKING, HER SAILS, EQUIPMENT, APPURTENANCES, ETC., and SOUTH STREET SEAPORT MUSEUM,

Defendant and Third-Party Plaintiff,

—against—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

MEMORANDUM AND ORDER

KNAPP, D.J.

The bark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one

position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.

On December 12, 1979 plaintiff, who was at that time an employee of defendant South Street Seaport Museum, was injured when a gant line gave way as he was repainting the PEKING's mast and spars in the course of his duties as an "historic ironworker." He returned to work on March 13, 1980. He has since filed a claim for workmen's compensation under, and has received benefits pursuant to, the New York Workmen's Compensation Law. He returned to work on March 13, 1980.

On March 14, 1980, after conferring with various low-level members of the museum administration, plaintiff met with the president of the defendant museum and asserted that the PEKING was seriously unsafe in several respects. The president, claiming that plaintiff's conduct amounted to insubordination, responded by firing him.

Plaintiff thereafter initiated this lawsuit against the bark PEKING and her owners, defendant South Street Seaport Museum. In Count I of the complaint plaintiff alleges admiralty and maritime jurisdiction and purports to state a claim against each defendant for negligence causing his December 12, 1979 fall. In Count II plaintiff claims that defendant South Street Seaport Museum discharged him in violation of his rights under § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1), and regulations promulgated thereunder, 29 C.F.R. § 1977.9(c) and seeks backpay and an order requiring the museum to reinstate him to his employment and to refrain from instructing him to work in unsafe conditions.

The defendants now move for summary judgment on both counts. For reasons that follow, we grant that motion.

Discussion

Count I

It is now settled that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), extends only to workers engaged in "maritime employment." *P.C. Pfeiffer Co., Inc.* v. *Ford* (1979) 444 U.S. 69, 73; *Fusco* v. *Perini North River Associates* (2d Cir. 1980) 622 F.2d 1111, 1113, *cert. denied sub nom. Sullivan* v. *Perini North River Associates* (1981) 101 S. Ct. 953. Having carefully considered the arguments of counsel, we conclude that plaintiff was not engaged in such "maritime employment."

In *Fusco*, the Second Circuit construed "maritime employment" to import a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." *Fusco, supra*, 622 F.2d at 1112. This brings to mind Judge Dawson's observations concerning admiralty law in *McGuire* v. *City of New York* (S.D.N.Y. 1961) 192 F. Supp. 866. He there stated (at 871):

> "Admiralty law is, in fact, the law of commerce. It was engendered as a result of the needs of commerce and flourished because of those same needs. Where it was feared that local ordinances or decisions might unduly impinge on international or interstate commerce, local statutes were held inapplicable in the face of the need for uniformity in maritime law. The touchstone has been whether the action . . . was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce."

In the case at bar plaintiff's employment had no relationship to navigation or to commerce over navigable waters. He was a museum employee and his activities related to keeping the museum in order. It is immaterial that the museum had at one time been a vessel in navigation, or that it happens to be located on navigable waters. Neither of these facts creates a "realistically significant relationship" between plaintiff's em-

ployment and ongoing navigation, or between such employment and interstate or foreign commerce. To the contrary, it is clear that plaintiff's employment was of purely local concern.[1]

Plaintiff apparently concedes—as he must—that unless his negligence claim falls within the ambit of LHWCA, it is barred by the exclusivity provision of the New York Workmen's Compensation Law, *O'Rourke* v. *Long* (1976) 41 N.Y.2d 219, 391 N.Y.S.2d 553. It follows that such claim must be dismissed.

Count II

Plaintiff predicates his claim for wrongful discharge on § 11(c)(1) of OSHA, 29 U.S.C. § 660(c)(1). That section prohibits an employer from discharging an employee for exercising "any rights" afforded by OSHA. It is clear beyond peradventure, however, that plaintiff is in no position to claim relief under OSHA. The statute sets forth in express detail the procedures to be followed by an employee who believes he has been discharged or otherwise discriminated against in violation of § 11(c)(1)—i.e., because he has exercised any rights afforded him by the Act. Specifically, the statute provides in § 11(c)(2), 29 U.S.C. § 660(c)(2), that such an employee:

> "may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this

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1 Any argument that the nature and location of the PEKING may have imposed a greater duty of care on its owners than that borne by owners of less intrinsically dangerous structures goes to the question of negligence and not to the question of coverage under LHWCA.

subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

Having never filed a complaint with the Secretary alleging that his discharge on March 14, 1980 constituted discrimination within the meaning of § 11(c)(1), plaintiff has forfeited any right OSHA may have afforded him to a remedy for such discharge. We need pass on no other question.

It follows that defendant's motion for summary judgment must be granted. The action is dismissed.

SO ORDERED.

Dated: New York, New York
June 3, 1981

WHITMAN KNAPP, *U.S.D.J.*

Affidavit of Norman Brouwer in Support of Motion For Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3258 (WK)

CRAIG MCCARTHY,

Plaintiff,

—against—

The Bark PEKING, her sails, equipment, appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Defendant and Third-Party Plaintiff,

—against—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

NORMAN BROUWER, being duly sworn, deposes and says:

1. I am the historian of the South Street Seaport Museum, curator of collections and the associate editor of Seaport Magazine responsible for historical accuracy. In my role as historian I have become familiar with the full history of the museum artifact PEKING and I now summarize that history.

2. PEKING was built in 1911 at Hamburg, Germany and entered the nitrate trade. In 1914, PEKING was caught at Valparaiso, Chile by the outbreak of World War I. At the conclusion of that war, she was awarded to Italy as reparations, but made only one passage under the Italian flag, from Valparaiso to Europe when she was laid up. In 1922 PEKING returned to the nitrate trade and continued in that trade until 1931 when she was purchased by the British Shaftesbury Homes and Arethusa Society where she was used as a floating school for boys. Conversion of PEKING for her schoolship hulk duties included installation of berthing spaces, offices, classrooms, a combination auditorium and gym, library, chapel and living quarters for the school's headmaster. PEKING was renamed ARETHUSA during this period, which was disrupted only during World War II when PEKING was used to provide accommodations for Royal Navy engineering petty officers at Chatham Dockyard.

3. On October 31, 1974 PEKING was purchased for the South Street Seaport Museum by the J. Aron Charitable Foundation at which time the name was changed back from ARETHUSA to PEKING.

4. PEKING was towed from England to New York by the Dutch tug UTRECHT and arrived in New York on July 22, 1975. PEKING had no motive power of its own and, indeed, was treated as a floating hulk by both English and United States customs officials.

5. PEKING is located at the South Street Seaport Museum. PEKING has not served as a commercial cargo vessel since at least 1931. PEKING lacks any motive power and the rudder has been welded into a fixed position since the 1930's such that PEKING would be incapable of movement under its own power.

6. At present restoration work is performed aboard PEKING, but for the sole purpose of restoring PEKING as a historically accurate museum exhibit and not for purposes of making PEKING fit for a return to traditional maritime

navigation and commerce, such as carrying passengers or freight for hire.

7. PEKING is not an enrolled or registered vessel and has not been such since its sailing days, with the possible exception of the World War II use by the Royal Navy, at which time PEKING was used only to provide accommodations to Royal Navy personnel.

8. PEKING is not subject to inspection and in fact has not been inspected by the United States Coast Guard.

/s/ NORMAN J. BROUWER
Norman Brouwer

Sworn to before me this
21st day of April, 1981

/s/ SUSAN J. PULASKI
Notary Public

Susan J. Pulaski
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission expires on March 30, 1982